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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

A10

DOCKET NO. 960119-CA

STATE OF UTAH :
Plaintiff/Appellee, : Case No. 960119-CA
v. :
GLEN RAY BULLOCK : Priority No. 12
Defendant/Appellant :

BRIEF OF APPELLANT

AN APPEAL FROM A CONVICTION OF ONE COUNT OF ASSAULT ON
PRISONER, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANNOTATED, TITLE 76, CHAPTER 5, SECTION 102.5, IN THE THIRD
JUDICIAL DISTRICT COURT OF TOOELE COUNTY, STATE OF UTAH
JUDGE LEE DEVER, PRESIDING.

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ATTORNEY'S FOR APPELLEE

FILED

OCTOBER 1996

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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v. :
GLEN RAY BULLOCK : Priority No. 2
Defendant/Appellant :

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for assault on a prisoner, a third-degree felony, in violation of Utah Code Ann. §76-5-102.5. This court has jurisdiction over the matter pursuant to Utah Code Ann. §78-2a-3.

ISSUE PRESENTED AND STANDARD OF REVIEW

Was the evidence presented at trial insufficient to support the verdict of the judge? The standard of review is based upon a "review of the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict" or findings of the court in a bench trial, State v. Johnson, 821 P.2d 1150, 1156 (Utah, 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in or appended to this brief.

STATEMENT OF THE CASE

On October 26, 1995, defendant was charged with assault on a prisoner, a third-degree felony, in violation of Utah Code Ann. §76-5-102.5 (R. 1-2). The charge stemmed from defendant's actions towards Ronnie Niel Tischner occurring on or about October 10, 1995 (R. 1-2). In a bench trial, the court convicted the defendant of the charge, (Tr. 164), and subsequently sentenced the defendant to a term of not more than five years, to be served at the Utah State Prison (R. 70).

STATEMENT OF THE FACTS

A. Nature of the Case

Defendant, Glen Ray Bullock, was convicted by bench trial in the Third Judicial District Court, Tooele County, on December 19, 1996, of assault on a prisoner, a third-degree felony, in violation of Utah Code Ann. §76-5-102.5 (1995) (Tr. 164). On February 5, 1996, Glen Ray Bullock was sentenced by Judge Lee Dever to the Utah State Prison for a term not to exceed five years (R. 70).

B. Course of Proceedings and Trial Court Disposition

Defendant was charged in an information dated October 26, 1996, with assault on a prisoner, a third-degree felony, in violation of Utah Code Ann. §76-5-102.5 (1995), (R. 1-2). Prior to preliminary examination, Glen Ray Bullock filed with the Third District Court, County of Tooele a motion for discovery (R. 4-7).

A preliminary hearing was held in this matter on November 8, 1995, (R. 13). Prior to this hearing, an entrance of counsel and request for jury trial was entered (R. 8-9). The request for jury trial was later waived by the defendant (R. 38). Following the preliminary hearing the defendant was bound-over to the Third District Court on the charge (R. 16). At an arraignment held on November 16, 1995, the Honorable John A. Rokich presiding, Bullock entered a plea of "not guilty" to the charge (R. 17).

Prior to trial, Bullock filed with the district court a motion to suppress all written statements and all verbal statements (R. 30-33), and a motion to suppress the statement of Ronnie Niel Tischner (34-36). On November 30, 1996, an

evidentiary hearing was held before the Honorable John A. Rokich on Bullock's pre-trial motions (R. 37).

At the close of this hearing Judge Rokich denied Bullock's motions to suppress (R. 37).

Defendant's bench trial was originally set for set for December 5, 1995, (R. 16), but was later postponed and actually held on December 19, 1995 (R. 46). On December 19, 1996, a bench trial was held in this matter with Judge Lee Dever presiding (R. 46). At the bench trial Bullock was represented by David C. Cundick (Tr. 100). Bullock was convicted by the court on December 19, 1995 (R. 46). After trial, Bullock filed a motion to arrest judgment or for new trial (R. 57-58). The motion was denied and Bullock was sentenced to a term of not more than five years at the Utah State Prison (R. 70).

A Notice of Appeal was filed on February 21, 1996, by David C. Cundick, and this appeal followed.

STATEMENT OF RELEVANT FACTS

On October 10, 1996, Ronnie Tischner, an inmate at the Tooele County Jail, was watching television in Unit A when he felt something on the back of his neck (Tr. 107). Mr. Tischner realized that someone had placed shaving cream on the back of his neck (Tr. 107). He became angry and accused two young men of putting the shaving cream on him (Tr. 108). At this point the defendant stepped in and told Mr. Tischner that it was he who had put the shaving cream on Mr. Tischner's neck (Tr. 141-142). Mr. Tischner, at trial, identified the defendant as the person who

admitted to putting shaving cream on Mr. Tischner's neck (Tr. 111). Mr. Tischner made a comment to the defendant asking the defendant what he was doing (Tr. 108). The two individuals then became antagonistic towards each other calling each other names and threatening violence towards each other (Tr. 142). At this point Mr. Tischner turned and proceeded to return to his cell (Tr. 108). The defendant proceeded to follow Mr. Tischner to his cell, cell A-1 (Tr. 133, 135). The defendant never quite entered Mr. Tischner's cell, but instead the defendant reared back and said "Don't fuck with me" (Tr. 133). As Mr. Tischner entered his cell he was hit on the back of the neck, fell forward and split open his eye when he hit the bunk bed (Tr. 109). When Mr. Tischner arose, there was no one around him (Tr. 109). At this point a Mr. Ramirez entered Mr. Tischner's cell and told Mr. Tischner that he needed stitches for the cut to his eye (Tr. 110). Mr. Tischner proceeded to the infirmary for medical treatment (Tr. 111). He was intercepted by Deputy Joe Walker who noticed that Mr. Tischner was bleeding quite profusely (Tr. 118). Deputy Walker was on his way to investigate the problem in Unit A (Tr. 117-118). When questioned by Deputy Walker Mr. Tischner responded that he had been hit from behind and pushed into the bunk bed by the defendant (Tr. 124). Deputy Walker called another officer to escort Mr. Tischner to the hospital for treatment (Tr. 119). Deputy Walker was later in the control unit when he received a call over the intercom from the defendant who wanted to explain his side of the altercation (Tr. 119, 121).

The intercom control panel lights indicated that it was an intercom call from cell A-3 (Tr. 127), and that the only person in cell A-3 at the time of the call was the defendant (Tr. 127). Deputy Walker then heard the defendant apologize over the intercom for striking Mr. Tischner but that he did so in self-defense (Tr. 121). Deputy Walker concluded it was the defendant not only from the control panel lights but that he recognized the defendant's voice as the one on the intercom due to his previous interactions with the defendant (Tr. 127-128).

SUMMARY OF THE ARGUMENT

In order to convict a criminal defendant the State must prove each and every element of the charge beyond a reasonable doubt. Mr. Bullock asserts that the State failed to meet its burden and therefore his conviction should be reversed.

To challenge the sufficiency of the evidence on appeal Mr. Bullock carries a great burden. He "must marshall all evidence supporting the ... verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict." State v. Lemon, 844 P.2d 378, 381 (Utah App. 1992) (citations omitted). Bullock must show that the evidence is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Dunn, 208 Utah Adv. Rep. 100 (Utah 1993). The element which Mr. Bullock alleges as unproven is the element which requires the state to prove beyond a

reasonable doubt that the defendant was the individual who committed the crime.

Bullock has marshaled all of the evidence in the light most favorable to the verdict in his statement of the facts. However, Mr. Bullock will likewise marshal here the evidence that is relevant to his sufficiency argument.

ARGUMENT

The first point is that the testimony of Ronnie Tischner must create reasonable doubt. Following the confrontation between Mr. Bullock and Mr. Tischner, Mr. Tischner turned to return to his cell (Tr. 108). Mr. Tischner stated that he could not tell if Mr. Bullock was following him, and even further he was not sure if anyone was following him at all (Tr. 108-109, 112-113). Mr. Tischner testified that after he was hit he got up and there was no one around and that he was uncertain whether the defendant was anywhere near his cell (Tr. 109, 113). Mr. Tischner never testified that it was the defendant who hit him. On the contrary, Mr. Tischner states that he was not sure if the defendant was following him at all and that when he arose there was no one around. In conjunction with this testimony, Mr. Tischner testified that he "just assumed" it was the defendant who pushed him, and that he "felt" it was the defendant (Tr. 114). Reasonable doubt cannot be overcome by assumptions and feelings. There is not one scintilla of evidence arising from Mr. Tischner's testimony which would allow a reasonable mind to go beyond a reasonable doubt. The only positive identification

made by Mr. Tischner is that it was the defendant who put the shaving cream on his neck (Tr. 111); no positive identification as to the defendant being the person who pushed Mr. Tischner was ever made by Mr. Tischner.

The second point is that the testimony of Deputy Joe Walker would have to create a reasonable doubt in the minds of a reasonable person. Deputy Walker testified on direct and on cross examination that the intercom call came from cell A-3 as he recognized the voice (Tr. 127-128). This testimony was bolstered by the fact that deputy Walker testified that the intercom light panel indicated that the call came from cell A-3 (Tr. 127) and that the only person in cell A-3 was the defendant (Tr. 127). The defendant was then called to testify at which time the defendant stated that his assigned cell was A-11, not A-3 (Tr. 145). This testimony was corroborated by defense witness Kevin John Reeder (Tr. 134). The defendant testified that cell A-3 belonged to two other individuals and that it was against the rules to enter into another persons cell (Tr. 149). Therefore, it was impossible for him to have been in cell A-3 when Deputy Walker received the intercom call as the defendant had never been in cell A-3 (Tr. 157).

Following the defendant's testimony Deputy Joe Walker was called as a State rebuttal witness. At this time Deputy Walker changed his testimony so as to conform to the testimony given by the defendant. Deputy Walker testified as a rebuttal witness that the call actually came from cell A-11 and that was the cell

to which the defendant was assigned at the time of the incident (Tr. 151). Deputy Walker testified that the defendant is currently assigned to cell A-3 and that is why he was mistaken on his earlier testimony (Tr. 151). Deputy Walker then testified that the intercom indicator light identified the call as coming from cell A-11, not cell A-3 (Tr. 151). However, this testimony is also flawed as on cross-examination Deputy Walker once again changed his testimony to agree to the fact that the defendant is currently assigned to cell A-4, not cell A-3, and Officer Walker acknowledged as much (Tr. 152).

The many times Deputy Walker was mistaken must have created a reasonable doubt as to the guilt of the defendant. Deputy Walker first stated that the control panel indicator lights showed the call as coming from cell A-3, then changed his testimony to say that the indicator lights showed that the call came from cell A-11. Had Deputy Walker stuck to his original testimony, Mr. Bullock would have been found not guilty as the admission of guilt could then not possibly have come from Mr. Bullock as he was never in cell A-3. A finding of guilt was only possible after Deputy Walker changed his testimony to conform to the testimony of the defendant.


The third point which must raise a reasonable doubt comes from the testimony of the only direct witness to the incident. Kevin John Reeder was called as a defense witness (Tr. 131). Mr. Reeder testified that the defendant never entered Mr. Tischner's cell, but remained outside the cell (Tr. 133). Mr. Reeder

testified that he did not, at any time, see the defendant strike Mr. Tischner (Tr. 136-137, 138) and that he only saw the defendant rear back as if to avoid being struck (Tr. 135).

CONCLUSION AND PRECISE RELIEF SOUGHT

Mr. Bullock requests that this court reverse his conviction because the evidence introduced at trial is "sufficiently inconclusive" and that "reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted," as the evidence was insufficient to prove beyond a reasonable doubt that the defendant did indeed commit the crime.

RESPECTFULLY SUBMITTED this 16 day of October, 1996.


David C. Cundick
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 1996, I caused to be mailed postage prepaid, two copies of the foregoing brief to the following party at the address indicated.

Jan Graham, Esq.
Utah Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

A handwritten signature in cursive script, reading "David C. Lundberg", written over a horizontal line.

ADDENDUM

Section	
76-5-408.	Reserved.
76-5-409.	Corroboration of admission by child's statement.
76-5-410.	Child victim of sexual abuse as competent witness.
76-5-411.	Admissibility of out-of-court statement of child victim of sexual abuse.

Part 5

HIV Testing — Sexual Offenders and Victims

76-5-501.	Definitions.
76-5-502.	Mandatory testing — Liability for costs.
76-5-503.	Voluntary testing — Victim to request — Costs paid by Crime Victim Reparations.
76-5-504.	Victim notification and counseling.

PART 1

ASSAULT AND RELATED OFFENSES

76-5-101. "Prisoner" defined.

For purposes of this part "prisoner" means any person who is in custody of a peace officer pursuant to a lawful arrest or who is confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles operated by the Division of Youth Corrections regardless of whether the confinement is legal. 1994

76-5-102. Assault.

(1) Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if the person causes substantial bodily injury to another.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another. 1996

76-5-102.3. Assault against school employees.

(1) Any person who assaults an employee of a public or private school, with knowledge that the individual is an employee, and when the employee is acting within the scope of his authority as an employee, is guilty of a class A misdemeanor.

(2) As used in this section, "employee" includes a volunteer. 1992

76-5-102.4. Assault against peace officer.

Any person who assaults a peace officer, with knowledge that he is a peace officer, and when the peace officer is acting within the scope of his authority as a peace officer, is guilty of a class A misdemeanor. 1987

76-5-102.5. Assault by prisoner.

Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree. 1974

76-5-102.6. Assault on a correctional officer.

Any prisoner who throws or otherwise propels fecal material or any other substance or object at a peace or correctional officer is guilty of a class A misdemeanor. 1994

76-5-103. Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony. 1995

76-5-103.5. Aggravated assault by prisoner.

(1) Any prisoner, not serving a sentence for a felony of the first degree, who commits aggravated assault is guilty of a felony of the second degree.

(2) Any prisoner serving a sentence for a capital felony or a felony of the first degree who commits aggravated assault is guilty of:

(a) a felony of the first degree if no serious bodily injury was caused; or

(b) a capital felony if serious bodily injury was intentionally caused. 1996

76-5-104. Consensual altercation no defense to homicide or assault if dangerous weapon used.

In any prosecution for criminal homicide under Part 2 of this chapter or assault, it is no defense to the prosecution that the defendant was a party to any duel, mutual combat, or other consensual altercation if during the course of the duel, combat, or altercation any dangerous weapon as defined in Section 76-1-601 was used. 1989

76-5-105. Mayhem.

[(1)] Every person who unlawfully and intentionally deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

(2) Mayhem is a felony of the second degree. 1973

76-5-106. Harassment.

(1) A person is guilty of harassment if, with intent to frighten or harass another, he communicates a written or recorded threat to commit any violent felony.

(2) Harassment is a class B misdemeanor. 1995

76-5-106.5. Definitions — Crime of stalking.

(1) As used in this section:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

(b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(c) "Repeatedly" means on two or more occasions.

(2) A person is guilty of stalking who:

(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:

(i) to fear bodily injury to himself or a member of his immediate family; or

(ii) to suffer emotional distress to himself or a member of his immediate family;

(b) has knowledge or should have knowledge that the specific person:

(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or

(ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and

term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum of fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of

Pardons and Parole except in cases involving degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, alimony, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination a matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedure Act, in its review of agency adjudicative proceedings.

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court.

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions at any location within the state.

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.

78-3-13.5, 78-3-14. Repealed.

78-3-14.2. District court case management.

78-3-14.5. Allocation of district court fees and forfeitures.

78-3-15 to 78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members —

Terms and election — Responsibilities —

Reports [Effective until January 1, 1997].

Judicial Council — Creation — Members —

Terms and election — Responsibilities —

Reports [Effective January 1, 1997].

78-3-21.5. Data bases for judicial boards.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment —

Qualifications — Salary.

78-3-24. Court administrator — Powers, duties, and

responsibilities.

78-3-25. Assistants for administrator of the courts —

Appointment of trial court executives.

78-3-26. Courts to provide information and statistical

data to administrator of the courts.

78-3-27. Annual judicial conference.